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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Revision of the Commission's Program Access Rules; News Corp. and The DIRECTV Group, Inc., Transferors, and Liberty Media Corp., Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp. (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al. MB Docket Nos. 12-68, 07-18, & 05-192

Dear Ms. Dortch:

The record in this proceeding demonstrates that competition in the MVPD marketplace is flourishing and that the percentage of cable program networks in which cable operators have an ownership interest has sharply declined over the years. Nonetheless, the beneficiaries of the program access rules, in recent ex parte filings,[1] continue to urge the Commission to extend the exclusivity ban once again. Twenty years after the ban's enactment, their arguments cannot be squared with Congress's "intention that the exclusive contract prohibition will eventually sunset" – which the D.C. Circuit expected the Commission to "weigh heavily" in this proceeding.[2]

DirecTV takes issue with charts recently submitted by NCTA[3] that demonstrate what is plain to see -- that the marketplace circumstances giving rise to the program access exclusivity ban in 1992 no longer exist. With respect to vertical integration, DirecTV claims that the number of cable-affiliated programmers has increased since the Commission last looked at this question.[4] But while there may have been a rise in the number of vertically integrated program

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1 DirecTV Ex Parte letter in Docket No. 12-68 et al. (Aug. 29, 2012); Coalition for Competitive Access to Content (CA2C) Ex Parte letter in Docket No. 12-68 et al. (Aug. 31, 2012).

2 Cablevision Sys. Corp. v. FCC, 597 F.3d 1306, 1314 (D.C.Cir. 2010).

3 NCTA Ex Parte letter in Docket No. 12-68 et al. (Aug. 23, 2012) (attaching graphs demonstrating the reduction (1) in cable's share of the multichannel video marketplace, from 97.7% in 1992 to 57.4% in 2011 and (2) in vertically integrated program networks, from 52.8% in 1994 to 14.4% in 2012).

4 DirecTV Ex Parte letter in Docket No. 12-68 et al. at 2 (Aug. 29, 2012).

networks, the significance of such vertical integration has diminished. This is because the number of unaffiliated programmers has also grown, so that, as the *Notice* in this proceeding shows, the overall percentage of vertically-owned networks has continued to decline.[5] The announced sale of Comcast's minority interest in the A&E Television Networks will further diminish the percentage of affiliated programming networks.[6]

DirecTV then tries to shift attention to the percentage of the top 20 networks affiliated with cable operators.[7] But once again, the facts do not support their claim that vertical integration is on the rise. Once Comcast divests its interest in A&E Networks, only 4 of the top 20 networks will be vertically integrated with a cable operator – 33% fewer than just five years ago.

DirecTV also claims that the decline in cable's share of multichannel customers in the past two decades fails to support elimination of the rule.[8] Pointing to the conditions that it was subjected to by the Commission when it was acquired by News Corp., DirecTV argues that the exclusivity prohibition that Congress expected to sunset ten years ago would remain necessary even if cable's share were to fall as low as 13%.[9] But the particulars of DirecTV's merger conditions undermine its contention. Among other things, News Corp. volunteered to comply with the program access rules as a condition in order to gain FCC approval of its merger application, and committed to adhering to program access rules even if Liberty divested its interest in News Corp.[10] DirecTV also neglects to mention that that condition would cease to apply if the exclusivity ban were to sunset.[11] If anything, DirecTV's claim proves the over-inclusiveness of the exclusivity ban. It applies regardless of a particular cable operator's share of the MVPD market – or, indeed, of whether that particular operator has any ownership interest in the programming at all, so long as some other cable operator does.

The blanket ban can no longer be justified in a world where cable operators as a whole serve fewer than 60 percent of all MVPD households and no individual cable operator serves more than 25 percent. As the attached economic analysis by Dr. Mark Israel shows, the rise of "mature competitors" such as DBS and telco providers "with a large base of subscribers and well established programming lineups" means they "could counter the hypothetical loss of particular

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5 *See Revision of the Commission's Program Access Rules; News Corp. and The DIRECTV Group, Inc., Transferors, and Liberty Media Corp., Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp. (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.*, Notice of Proposed Rulemaking, 27 FCC Rcd 3413 (Mar. 20, 2012) at App. B, Table 1 (indicating that 14.4% of satellite-delivered national programming services are cable-affiliated, down from 22% at the time of the last extension).

6 *See* NCTA Reply Comments at 6 (noting that after the transaction closes, only 12.3% of programming networks will be vertically integrated).

7 DirecTV Ex Parte letter at 2.

8 *Id.*

9 *Id.*

10 *In the Matter of General Motors Corp. and Hughes Electronics Corp., and The News Corporation Ltd. for Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶113 (2004).

11 *Id.* at ¶128.

cable-affiliated networks with their own competitive strategies. Hence, a per se ban on exclusive distribution of cable –affiliated programming is no longer needed to foster competitive entry.” [12]

Dr. Israel’s paper also refutes CA2C’s claim that economic theory supports retention of the exclusivity ban. Instead, he demonstrates why a per se ban on exclusive arrangements is inappropriate: “Just as any firm’s refusal to license its products to its competitors is not necessarily anti-competitive, but rather may be an important part of the competitive process, a cable-affiliated network’s refusal to license its programming to other MVPDs may be central to a pro-competitive and pro-consumer strategy.”[13] His analysis further shows that it would be “incorrect to conclude that it is uniquely pernicious for vertically integrated programming networks to refuse to deal with unaffiliated MVPDs.”[14] Under these circumstances, as Dr. Israel explains, “[e]ven if a per se ban on the exclusive distribution of cable-affiliated networks was justified at the time Congress adopted it, such a blanket ban is no longer appropriate.”[15]

The exclusivity ban should sunset as Congress intended.

Sincerely,

/s/ Rick Chessen

Rick Chessen

cc: Elizabeth Andrion
Lyle Elder
Bill Lake
Michelle Carey
Nancy Murphy
Mary Beth Murphy
Kathy Berthot
David Konczal
Jonathan Levy
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Attachment

12 Mark Israel, *An Economic Assessment of the Prohibition on Exclusive Contracts for Satellite-Delivered Cable-Affiliated Networks*, Declaration, at 5 (Sept. 5, 2012) (“Israel Declaration”).

13 *Id.*

14 *Id.* at 6.

15 *Id.* at 34.